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July 16, 1996

Via Federal Express

William F. Caton, Secretary
Federal Communications Commission
2033 M Street, NW
Room 222
Washington, D.C. 20054

Re: In the Matter of Billed Party Preference for InterLATA 0+ Calls
CC Docket No. 92-77

Dear Secretary Caton:

Our office represents the New Jersey Payphone Association ("NJPA"). NJPA is an organization of non-local exchange company payphone providers who provide pay telephone service to customers in New Jersey. NJPA members will be significantly affected by the proposed rule-making commenced by the Federal Communications Commission in the above-captioned matter, and we therefore wish to submit the enclosed comments with respect thereto.

Should any questions arise as to this matter, please do not hesitate to contact us.

Very truly yours,

Dennis C. Linken

Dennis C. Linken

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Billed Party Preference for	)	CC Docket No. 92-77
InterLATA 0+ Calls	)	

COMMENTS
OF
NEW JERSEY PAYPHONE ASSOCIATION

The New Jersey Payphone Association ("NJPA") is an organization of non-local exchange company ("non-LEC") payphone providers who provide pay telephone service to New Jersey customers. NJPA members are small companies; indeed, many are "Mom and Pop" firms. [The largest, interestingly, is but 1/500th the size of Bell Atlantic-New Jersey, Inc. ("Bell") — the predominant local exchange company ("LEC") in New Jersey, and also the overwhelmingly most significant payphone provider in the State.]

NJPA wishes to comment upon the Second Further Notice of Proposed Rulemaking ("NPRM") commenced by the Federal Communications Commission ("FCC" or "Commission") with respect to its billed party preference ("BPP") proceeding.

I. INTRODUCTION

In the NPRM, the Commission attempts to address the problem it has identified with respect to high operator service provider ("OSP") and payphone service provider ("PSP") rates. NJPA has strong concerns about the proposals set forth by the Commission. Before continuing, however, we wish to point out that NJPA wholeheartedly agrees with the FCC in its efforts to develop a competitive marketplace in which consumers can experience the full benefits of open and real competition. The proposals of the Commission however, attempt to eliminate the symptoms of the problem rather than to cure the underlying cause.

We have endeavored to be as complete as possible with respect to the matters discussed herein. This proceeding is of crucial importance to NJPA members; it is equally important, however, to many residents in New Jersey's towns and cities. Most of the proposed rules could have drastic and adverse (and unintended) consequences upon the people whom they are designed to help. It is vital, therefore, that before the Commission implements same it must explore, in depth, the full ramifications of its proposals.

Our comments will address NJPA's specific areas of concern.

II. RATE PROVISIONS

The Commission sets forth several alternatives, all designed to rectify, in various measures, the difficulty determined by the Commission to exist concerning the high rates of some OSPs and PSPs.

A. IMPACT OF PROPOSED RULES

The Commission proposes to cap OSP rates or to require oral disclosure (in several potential variations) so as to enhance consumer awareness. If the Commission takes action, we urge that the proposal put forth by the American Public Communications Council ("APCC") be utilized. To NJPA, the APCC proposal represents a reasonable compromise of all of the parties' interests, including primarily the calling public, but does not carry with it the potentially harmful results of the other suggestions voiced in this proceeding. Unfortunately, if the Commission does not first root out the cause of the problem, many of the various proposals discussed will actually be detrimental to the calling public: NJPA believes they will seriously and irreparably injure all non-LEC payphone providers economically and could, quite literally, drive some of them out of business.

There are some, of course, who will say "Who cares? So what if the non-LEC payphone companies go out of business? Who do they help, anyway?" The answer is that if such companies are driven out of business, many people will be hurt in many ways.

Most of the non-LEC payphone providers in New Jersey, especially the very small operators, are New Jersey residents who live and work in our communities.

They support their families and they support payrolls comprised of other employees who also live and work in our municipalities. In fact, the non-LEC payphone industry in New Jersey employs hundreds of people. They contribute to New Jersey's economy and tax base. To impose the rate caps discussed by the FCC without carefully and open-mindedly first examining their impact — without fully exploring the true cause of the problem — will, as demonstrated below, force many non-LEC PSPs out of business. Not only will this be economically disastrous to those affected, it will also negatively impact New Jersey's economy.

Most importantly, however, to do so will harm those who most need payphones — the many New Jersey residents who rely upon payphone telephone service for communication to the outside world. For many years, non-LEC payphone providers have filled a need not met by the incumbent LECs. NJPA estimates that more than <u>120 million calls</u> were carried by New Jersey non-LEC payphones in 1995 — more than 340,000 per day! Moreover, while regrettable, it is nevertheless true that many residents in our cities are simply too poor to afford private residential telephone service. In Newark alone, it is estimated that more than 13,000 households, 15% of the population, lack residential telephone service. These individuals depend upon non-LEC pay telephones as their only means of communication to others. Important and even vital calls, such as those to doctors, hospitals or police and fire departments, are carried through NJPA members' phones. Were the rate caps to be implemented without examination by the Commission of the issues raised herein, such individuals will, without question, be severely adversely affected, for many of the non-LEC payphone providers who supply service to the poorer communities in our State will no longer be able to do so.

Nor will the impact of such action be minimal. NJPA members have placed more than 1,600 payphones in the Newark community alone. They have also placed more than 500 payphones in Trenton and 600 in Camden, in addition to other cities throughout the State. Statewide, NJPA estimates there to be over 7,000 payphones placed by NJPA members in our major cities -- and that does not include non-NJPA member payphones. These payphones are absolutely necessary. They are used, and not just for ordinary telephone conversations -- they are needed for emergencies as well. NJPA estimates that more than 400,000 "911" calls are made annually on non-LEC payphones.[1] Those calls have been routed to all manner of emergency services, including not only police and fire departments but ambulance and rescue squads, poison control centers and other crucial services. And of all the non-LEC payphones in our cities, approximately 60% are located in lower income areas. Were proposed rate caps or some of the rate disclosures to be implemented (other than that suggested by APCC) without rectifying the problems non-LEC payphones experience (discussed below), such action will force many non-LEC payphone companies out of business and, again, quite literally, may well put New Jersey residents in danger. Simply stated, non-LEC payphone companies provide a necessary service to our citizens that the LECs do not.

This is not to say that NJPA members do not recognize the concern of the Commission with regard to end user rates. They do. But they also believe that other

[1]NJPA will be pleased to make available to the Commission all of the information discussed by NJPA in this proceeding.

measures (which we will detail) can be implemented by the Commission which will not only avoid the serious economic consequences to be caused by most of the proposed rules but would actually aid consumers.

B. CAUSE OF HIGHER RATES

The difficulty is that the FCC proposals do not address the real problem. They ignore the causes of higher non-LEC payphone provider and OSP rates. By focusing on the real causes of the problem, discussed below, the FCC can reduce rates to the public even without the need for the proposed rate caps or disclosures.[2] Examining the real problem is vital, however, if the Commission is to truly aid New Jersey residents.

1. Lack of Dial Around Compensation

In New Jersey, non-LEC payphone providers lack "dial around" and subscriber 800 call compensation for intrastate calls. With respect to interstate calls, the Commission has provided for dial around compensation but subscriber 800 call compensation is not yet provided. The Commission has, of course, initiated a proceeding in which it is exploring proposals to implement compensation for such calling on both an interstate and intrastate level. Nevertheless, at the present time, such compensation is insufficient. While it partially exists for interstate calls, the level of compensation is deemed by most, if not all, non-LEC payphone providers to be insufficient. More importantly, virtually 80% or more of all dial around calling experienced by New Jersey non-LEC payphone providers is felt to be intrastate in nature, for which no compensation at all is provided. The Commission cites in this

[2]By the same token, however, if the Commission resolves the real causes of the problem, by definition, reasonable rates or disclosures will not be objectionable, for they will no longer be necessary.

proceeding its concern that non-LEC payphone provider rates are too high. Yet, NJPA strenuously believes that such rates are higher than they would otherwise be because they do not receive compensation for intrastate dial around or subscriber 800 calls nor do they receive compensation for interstate subscriber 800 calls. Were intrastate dial around and subscriber 800 call compensation to be provided, it would have a tremendous impact upon non-LEC payphone provider revenues. The undisputed importance of these facts is simple: If such compensation is provided, non-LEC payphone rates will not be as high.

We recognize, of course, that the instant proceeding centers around proposed rate caps and/or rate disclosures. It does not discuss dial around compensation, a matter addressed in a separate proceeding. Nevertheless, the two topics are intrinsically tied to each other. If intrastate dial around and subscriber 800 compensation had been awarded by the Commission, it would have substantially reduced the pressure upon non-LEC payphone providers to charge higher rates. There can be little doubt that dial around and subscriber 800 call compensation as a conceptual matter is both necessary and appropriate. To deny such compensation requires non-LEC payphone providers to carry such calls and not be compensated in any fashion. In fact, it is most telling to observe that of all the carriers handling such calls, only the payphone provider, without whom the call could not have been made in the first place, does not receive compensation. If dial around and subscriber 800 compensation were provided to non-LEC payphone companies, the necessity to recover their costs of operation could be spread out over all users, not just those who make operator assisted calls (a <u>much</u> smaller number, as will be demonstrated), thereby serving to lower the rates to be charged for OSP calls.

The inclusion in the new federal Telecommunications Act of 1996 (sometimes the "federal Act") of a provision requiring the Commission to commence a rule-making proceeding designed to award intrastate dial around and subscriber 800 compensation, implicitly recognizes NJPA's argument. <u>See</u> 47 U.S.C. §276(b)(1)(a). The absence of such compensation is a major contributor toward higher OSP rates (for the non-LEC payphone providers are deprived of the revenue to which they are justly entitled). Thus, if the FCC desires nonetheless to implement caps upon OSP and non-LEC payphone provider rates, or to require the rate disclosures suggested by those other than APCC, it must first implement intrastate dial around and subscriber 800 compensation.

2. <u>Bell's Costs of Payphone Service Are Subsidized</u>

The Commission has concluded that some OSP rates are too high because they are higher than the rates of the three dominant interexchange carriers ("IXCs"). The New Jersey Board of Public Utilities ("BPU") reached a similar conclusion based upon the fact that non-LEC OSP rates were higher than the LEC and AT&T.[3] But, what may appear to be higher rates at first blush mav not really be the case. As will be discussed, Bell's payphone costs are subsidized and AT&T's rates do not reflect the costs of providing and maintaining payphones. [The same is true of the other two IXCs.] Thus, the <u>true</u> cost of a Bell and an AT&T call through a payphone would

[3]Docket No. TX95100518.

obviously be much higher. NJPA believes that Bell's and AT&T's rates, if they truly reflected all costs, would be higher than non-LEC payphone providers.

In a recent proceeding, the BPU compared the highest non-LEC payphone provider rate (assuming a call of 5 minutes in duration over 18 miles in length) to the rate charged were the same call carried by Bell and AT&T. The BPU calculated the end user rate of such a call to be $1.10 if carried by Bell, $1.55 if carried by AT&T and $9.90 if carried by the highest priced non-LEC payphone provider.[4] Several points are in order and are critical to the BPU's conclusions and to the similar assumptions made by the Commission in the instant proceeding.

First, the costs incurred by non-LEC payphone providers in providing service are higher than the costs incurred by both Bell and AT&T. Indeed, they are substantially higher. Moreover, and astoundingly, the costs incurred by non-LEC payphone providers are actually higher than the end user rates charged by Bell and AT&T.

The question, of course, is how in the world could the costs of non-LEC payphone providers be greater than the rates charged to end users by their competitors. The answer is simple: Bell subsidizes its pay telephone operation and the IXCs do not operate payphones. As proven in at least one other state, Bell's pay telephone operation is subsidized by its regular basic telephone service operation. The reason, therefore, that Bell can charge only $1.10 for the illustrated call is only because its real costs for that call are being subsidized by all New Jersey ratepayers. If Bell were placed on the same footing as non-LEC payphone providers — were its

[4] Id.

pay telephone operation not subsidized — it would not be able to provide the call for $1.10. As AT&T, MCI and Sprint do not operate payphones, they therefore do not have to recover the costs of providing or maintaining them.

It is not entirely surprising, therefore, that the federal Act contains a provision specifically addressing this concern. See 47 U.S.C. §276(a)(1). The federal Act mandates that Bell's payphone operation not be subsidized by its basic exchange and access operations. Congress recognized and addressed the very problem about which NJPA has complained for years. Until this situation is resolved, the disparity between payphone rates of LECs (and the major IXCs) as compared to non-LEC PSPs is likely to continue.

3. Bell's Charges to Non-LEC Payphone Competitors Are Discriminatory

Another fact of serious consequence, which must be examined by the FCC, surrounds the charges imposed by Bell upon non-LEC payphone providers for line charges and related services (including, for example, touch tone service, message units, etc.). NJPA has also complained for years that Bell improperly prices the services it provides to its non-LEC payphone provider competitors substantially higher than it charges itself for the same services. Despite such complaints, Bell's charges to non-LEC payphone providers have not been brought into line.[5]

[5]Bell is in the process of preparing a cost study which, we believe, will substantiate NJPA's position and show that its costs are significantly lower than those it charges to its payphone competitors. However, even in the absence of such proof, it is easy to demonstrate the unfairness of Bell's charges to non-LEC payphone providers. Bell's current charge to businesses for dial tone is approximately $11.00. But its charge to non-LEC payphone providers is about $22.00, for virtually the identical service. There is no difference between the telephone line provided to a business and that provided to a non-LEC payphone. Yet, Bell discriminates against non-LEC payphones by charging so much more. This situation is exacerbated because Bell does not impute to itself the same charges as are imposed upon non-LEC payphones, in contravention of the New Jersey Telecommunications Act of 1992, N.J.S.A. 48:2-21.19(e)(1).

The validity of NJPA's claims is again borne out by the federal Telecommunications Act of 1996. That statute expressly prohibits Bell from discriminating against its payphone competitors in favor of its own payphone operations. 47 U.S.C. §276(a)(2). Congress' inclusion of such a specific restriction was not by accident. The problems encountered by the non-LEC payphone industry in terms of overcharges by Bell have at long last been recognized.

The economic consequences of Bell's actions are significant. Of all the costs incurred by non-LEC payphone providers, the greatest portion, without question, is attributable to the telephone charges imposed by Bell. Fully one-third, on average, of all non-LEC payphone provider operating expenses consist of Bell charges for telephone service.

It is clear, therefore, that if the Commission were to examine Bell's charges, and to reduce same to the same level charged by Bell to itself, a significant reduction in non-LEC payphone provider expenses would occur. Obviously, if this were the case, there would be substantially less need for the higher rates charged by non-LEC payphone providers on OSP calls.

When one examines the economic situation in which Bell and non-LEC payphone providers exist, the implications of Bell's inflated and discriminatory pricing, while outrageous, are perhaps understandable, for Bell is the sole source of telephone service available to non-LEC payphone providers. They cannot obtain telephone service from any source other than Bell. No other competitive suppliers are available to them. Yet, at the same time, and incredibly, Bell is their single largest competitor. Bell alone accounts for more than 80% of the payphone market in New Jersey.

This leads to an astonishing economic reality. Non-LEC payphone providers must compete with a Goliath from whom they are required to purchase their services. When that Goliath charges prices many, many times higher than those charged to its own pay telephone operation, the results are disastrous. In order to survive, non-LEC payphone providers <u>must</u> charge rates higher than Bell. They simply have no choice.

We have in the past used an often-cited illustration to highlight the absurdity of this situation. It is still true today. It is as if McDonald's were the only source of hamburgers available to Burger King and Wendy's. Having been forced to purchase their hamburgers from McDonald's, Burger King and Wendy's would now be required to compete with McDonald's — their sole supplier. Moreover, if McDonald's charged Burger King and Wendy's "retail" prices for hamburgers, but only charged itself "wholesale", Burger King and Wendy's would <u>have</u> to charge more to the public. They would have no choice. This is the situation in which non-LEC payphone providers find themselves.

This, however, is not the situation sought by non-LEC payphone providers. As the Commission can appreciate, it is extremely difficult to survive when one's competitor (indeed, one's overwhelmingly largest competitor) charges less because it subsidizes its operation and discriminates against its competitors. Before the Commission imposes rate caps upon non-LEC PSPs, or requires rate disclosures, it should examine and correct the cost subsidies of the LECs and eliminate the disparate treatment afforded their payphone competitors by the LECs.

C. EFFECT OF LOSS OF DIAL AROUND AND subscriber 800 CALL COMPENSATION AND BELL DISCRIMINATION: COSTS BORNE BY SMALL GROUP OF RATEPAYERS

To graphically illustrate the difficulty faced by non-LEC payphone providers, and to gain a realistic perspective on the rate situation, it is necessary to examine the various types of calls carried by non-LEC payphone providers and the contribution they make to such providers' businesses. The importance of doing so is to determine whether each segment of the business contributes to its profitability. Exhibit A depicts the various types of calls handled by non-LEC payphone providers and reflects the percentages of revenues attributable to each type of service.[6] As will be seen, "free calls", such as 411, emergency calls and the like, make up 3% of the total volume of calls. Obviously no revenue is received from such calls. Dial around and subscriber 800 calls account for nearly 27% of total traffic but generate no revenue and therefore no profit! At the same time, direct dialed coin calls, which are the largest portion of non-LEC payphone providers' business, make up nearly 67% of all calls carried. Yet, coin calls actually generate a loss to non-LEC payphone providers (because non-LEC payphone providers' costs of providing direct dialed coin calls, unlike Bell, are not subsidized). Thus, the brunt of the costs to provide all of these calls falls upon the only remaining group of calls for which a fee can be charged:

[6]The information presented in these Comments reflects data collected from 20 "across the board" non-LEC payphone companies, ranging from the smallest to the largest, and reflects more than 1 million calls. It is, therefore, representative of the industry as a whole.

OSP calls. **But OSP calls make up only 2.9% of all calls. This small group of calls is therefore forced to make up for free calls, dial around and subscriber 800 calls, which generate no revenue at all, and for direct dialed coin calls, which generate a loss.**

The implications of Exhibit A are obvious: A significant portion of non-LEC payphone providers' business consists of certain services (dial around calls and subscriber 800 calls) which contribute absolutelv no revenue at all to the payphone provider. As a result, the costs of providing such calls must be borne by other than those who cause the costs for such calls, since those who make such calls are not required to pay for them. In addition, a very large portion of non-LEC payphone providers' business comes from direct dialed coin calls. This portion of non-LEC payphone providers' business actually results in a loss to non-LEC payphone providers. The result of both of these factors is that the costs attributable to those calls must be borne by the one, very small, segment of their business for which charges may be imposed. In other words, all of the losses attributable to direct dialed coin calls and all of the costs attributable to the "free" calls for which no revenue is received (dial around and subscriber 800 calls) must be recovered from the tiny portion of ratepayers who may be charged for calls: OSP calls. To charge only 2.9% of the calls with the unrecovered costs of providing all of the other calls is unfair, but non-LEC payphone providers have no choice. Until the Commission eliminates the LEC subsidies, and until it corrects the inequitable and discriminatory charges imposed by Bell upon its competitors for dial tone and related services, and until the Commission awards compensation to compensate non-LEC payphone providers for the costs incurred in carrying dial around and subscriber 800 calls, non-LEC payphone providers must charge rates higher than the LECs or IXCs simply to survive.

D. NON-LEC PAYPHONE PROVIDER COSTS ACTUALLY EXCEED BELL AND IXC END-USER RATES

NJPA has accumulated and presents herein information which it believes will be helpful for the Commission to make a reasoned determination in this matter. Again utilizing the BPU's 5 minute 18 mile call for illustrative purposes, it will be seen that the average cost incurred by a non-LEC payphone provider to carry such a call is greatly in excess of the rate charged by Bell to the public! Exhibit B reflects the average cost per call incurred by non-LEC payphone providers. This cost varies very little with regard to mileage. Thus, it can be reliably viewed when examining the BPU's hypothetical 5 minute, 18 mile OSP call Before discussing such costs, it should first be remembered that the rates charged by Bell and AT&T to the end user are $1.10 and $1.55, respectively. The average cost of such call to a non-LEC payphone provider — just the cost, without any profit — is $2.86! Moreover, that cost reflects only the operation of the non-LEC payphone provider itself without any regard to the costs incurred by an operator service provider.

These are actual, real costs of operation It is obvious, as a result, that the application of the proposed rate caps would be economically adverse, to say the least, to non-LEC payphone providers. If AT&T's rate were determined to be the highest tariffed facilities based carrier, the cap imposed by the Commission would be $1.78, far below the cost incurred by non-LEC payphone providers to carry the subject call.

At the same time, it is equally obvious that rate disclosure requirements, if based upon the standard discussed by the Commission (the average rate of AT&T, MCI and Sprint) would be greatly unfair.

E. THE COMMISSION IS REQUIRED TO AFFORD NON-LEC PAYPHONE PROVIDERS AN OPPORTUNITY TO EARN A FAIR AND REASONABLE RETURN ON INVESTMENT; BEFORE RATE CAPS ARE IMPOSED, THE COMMISSION MUST EXAMINE COSTS

Absent the actions we have requested, any rate caps proposed at the level discussed by the Commission will have disastrous results. They will force non-LEC payphone providers to cap their rates at levels below their actual costs. This, of course, the Commission cannot legally do. It is a fundamental precept of public utility regulation that the regulated entity be afforded an opportunity to earn a fair and reasonable return on its investment. This proposition is so basic a tenet of regulatory law as to not even require elaboration. See, *Smyth v. Ames*, 169 U.S. 466, 547 (1898); *Bluefield Water Works & Improvement Co. v. Public Service Com. of West Virginia*, 262 U.S. 679, 692-93 (1923); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). The Commission will not have done so if rate caps, at the levels suggested, are adopted. The Commission has not examined the actual costs incurred by non-LEC payphone companies. NJPA welcomes such examination and, in that regard, will make books and records available to the Commission and its Staff for review. It is patently obvious that to require that a non-LEC payphone provider charge rates below its costs would deprive the non-LEC payphone provider of any opportunity to earn a fair and reasonable return on investment, for it would force the provider to operate at a loss.

As noted above, the Commission must allow non-LEC payphone providers an opportunity to earn a fair and reasonable return on their investment. It is evident at face value that a rate cap which does not take into consideration the fact that costs will exceed such rate cap does not provide such opportunity. Such proposed rules would clearly be confiscatory.

By the same token, rate disclosures based upon the level discussed, and which therefore advise consumers (implicitly or explicitly) that rates above that level are unreasonable or inequitable, fail to take into account that non-LEC PSP costs are substantially greater than the costs of the LEC and IXCs. Thus, the rate disclosures suggested by those parties other than APCC, if based upon the Commission's assumed standard, cannot possibly be deemed fair and equitable.

VII. CONCLUSION

In sum, if the Commission awards compensation for dial around and subscriber 800 calls, and if it adequately addresses the LEC cross-subsidy and rate discrimination problems above in compliance with the federal Act, no rate cap restrictions or notice provisions will be required. [At the same time, it necessarily stands to reason that if the Commission so acts, reasonable rate caps or disclosure requirements would not be objectionable.] However, it is essential that the Commission address the real causes of the problem.

NJPA members request only that they be afforded an opportunity to earn a fair and reasonable return on their investment.[7] If the Commission takes the actions we have previously requested, rates charged by non-LEC payphone providers to the public will of their own accord decrease. By placing LEC and non-LEC payphone providers on the same footing (that is, by eliminating LEC subsidies and examining and controlling the costs charged by LECs to their payphone competitors), and by requiring dial around and subscriber 800 compensation to be paid, the Commission will eliminate the need of non-LEC payphone providers to recover higher rates from a very small segment of their customers.

[7]One thing is certain: Non-LEC payphone providers do not fear competition. By necessity, they operate as leanly and economically as possible. Because they do not receive compensation for dial around and 800 subscriber calls, and because the coin call portion of their business generates losses (as a result of Bell's discrimination), they must recover all of their costs through the remaining OSP calls. Given the small portion of their business made up of operator service provided calls (only around 2.9%), the base over which they can recover their costs is very, very small. As noted above, this is a driving force in terms of forcing non-LEC payphone providers to charge rates higher than LECs. At the same time, however, non-LEC payphone providers are compelled to keep their other costs to a bare minimum. As a consequence, non-LEC payphone providers are actually far more efficient than the LEC. If Bell's payphone operation were not subsidized, its calls would likely be priced higher than non-LEC payphone providers.